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IN THE

Supreme Court of the United States

October Term, 1976
No. 76-811

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Petitioner,

vs.

ALLAN BAKKE,
Respondent.

On Appeal From the Supreme Court of the State of California.

[redacted] Price M. Cobbs, M.D., Ephraim Kahn, M.D., et al., to File Brief Amici Curiae and Brief of Amici Curiae.

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On Appeal From the Supreme Court of the State of California.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE.

Price M. Cobbs, M.D., Ephraim Kahn, M.D.,
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Jose Antonio Aguilar, M.D.
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Robert S. Chang, M.D. (Professor of Medical Microbiology and Family Practise, University of California, Davis)
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Gerald E. Thomson, M.D. (Director of Medicine, Harlem Hospital)

Quentin D. Young, M.D. (Chairman Department of Medicine, Cook County Hospital, Chicago)

respectfully move for leave to file a brief *amici curiae* in this case.

The parties have consented to the filing of this brief and letters of consent have been filed with the clerk of this Court.

Amici are physicians and surgeons, educators, psychiatrists and other members of the medical profession

in California or elsewhere, who share a common concern that the opportunity for medical education be extended equally to all persons in our society. *Amici* include members of various minority groups.

Amici believe that the issue to which our brief is addressed is extremely important in terms of the appropriate resolution of questions arising under the Fourteenth Amendment to the United States Constitution.

Amici believe that this Court will discover, upon a full record, briefs and argument, that this record is totally inadequate for reaching a decision in a case of such far-reaching social importance.

Amici believe the record to be inadequate for the reason that no evidence was presented to the trial court, although such evidence was available, of past discriminatory impact and intent against Black and Brown applicants to the medical school.

We believe that this *Amici* brief will be of assistance to the Court by pointing out the doctrinal basis for the proposition that where appropriate circumstances develop subsequently to the granting of certiorari this Court will find that certiorari has been improvidently granted.

For these reasons, we respectfully request leave to file the within brief *Amici Curiae*.

Respectfully submitted,

LEO BRANTON, JR.,
ANN FAGAN GINGER,
SAM ROSENWEIN,
LAURENCE R. SPERBER,
Attorneys for Movants.

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BRIEF OF AMICI CURIAE.

Amici are members of the medical profession and include doctors who are members of various minority groups. They share a concern that the opportunity for medical education be extended equally to all persons in our society, and that broader avenues for study be opened to members of minority groups which have traditionally been barred from pursuing medical education by a systematic pattern of discrimination used against them.

Amici believe that the disproportionately small number of doctors engaged in the practice of medicine who are members of minority groups, specifically Black and Brown, has a deleterious effect on the medical services available to the large Black and Brown Communities in California and elsewhere who stand seriously in need of more extensive medical care.

Amici have become concerned with the far-reaching significance of the decision of the California Supreme Court in ***Bakke v. The Regents of the University of California***. *Amici* are disturbed that the decision of the California Supreme Court was reached upon a record totally inadequate for a case of such far-reaching social importance. *Amici* are familiar with the arguments that have been presented by the parties and with the record, and conclude that the present litigation is not capable of a decision on the merits by this Supreme Court.

Amici are aware that objections by third parties have previously been raised to the granting of the writ of certiorari to this Court. They believe that having granted certiorari, read the briefs and heard oral arguments herein, this Court will conclude that certiorari has been improvidently granted. When circumstances develop subsequent to the granting of certiorari, upon completion of oral argument, this Court has the power and the duty to hold that certiorari has been improvidently granted.

Amici further believe that this Court will be convinced upon a full hearing on the merits that the record produced in the trial court on the basis of which the California Supreme Court reached its conclusion is wholly inadequate. Counsel for both parties stipulated that the matter be heard upon the pleadings, declarations, interrogatories and the declaration and deposition of George Lowrey, M.D., Dean of Admissions and Chairman of the Admissions Committee at the School of Medicine, University of California at Davis [CT 61-72, 141-194], together with certain attached exhibits. No oral testimony was taken, and while each of the parties filed extensive briefs, there

was no testimony taken from expert witnesses, students, or members of the minority communities to be served. *Amici* urge this Court upon its full consideration of the record below to discover for itself that the record discloses a failure to present evidence of past discriminatory intent and impact against Black and Brown applicants to the medical school. It is possible that the failure to present such evidence resulted from a conflict of interest between that of the University and that of minority students. When circumstances come to the attention of this Court that essential evidence is missing from the record upon which a constitutional holding must be bottomed, then it is apparent that the matter is not ripe for decision and that an appropriate constitutional determination cannot be made. One of the basic elements in reaching that determination, namely the existence vel non of past discrimination, cannot be determined from the state of the record.

The basic constitutional question is of course whether the medical school's special admission program was constitutionally permissible as a remedy for past discrimination. *Swan v. Board of Education*, 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971). The California Supreme Court found that "there is no evidence in the record to indicate that the University has discriminated against minority applicants in the past." (18 Cal.3d 34, 59.) *Amici* believe that such evidence exists[1] When this fact becomes apparent to this Court upon full hearing on the merits, it then seems clear

---

[1]See Appendix "A", Statement of John S. Wellington, M.D., former Associate Dean at the School of Medicine, University of California at San Francisco, with responsibility for admission. Such available testimony would have been highly relevant to the issue of past racially exclusionary policies at the medical schools of the University of California.

that this circumstance makes it imperative that the Court find that certiorari has been improvidently granted.

It has been clear since *Swan v. Board of Education, supra,* that past discrimination is a fact to be proven if the University is to justify its program of preferential admissions. Compare *Washington v. Davis,* 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). A variety of proofs were available but not produced at the trial.

Although not sufficient in themselves, figures on the acute underrepresentation of minority physicians in California were relevant and available, but nowhere referred to by the parties.

The California State Employment Department, in two reports, dated November 1975, "Employment Data and Research," one for California and the other for Los Angeles County, discloses as to "Physicians, Dentists and Related Practitioners," the following data:

1970 Statewide population:	Black 7%	Spanish 15.5%	Other 4% (non-white)
Physicians, Dentists & related, Statewide:	2.1%	5.0%	5.5%
1970 Los Angeles County population:	10.8%	18.3%	3.5%
Physicians, Dentists & related, Statewide:	3.1%	5.8%	5.6%

Mr. Justice Tobriner noted in dissent below that minorities were grossly underrepresented in the medical profession but the record is devoid of proof.

It is apparent from the record that substantial reliance was placed by the University on the Medical Colleges Admission Test, but no proof was adduced that this reliance had the effect of actively discriminating against minorities. Proof could have been adduced that the test makes minorities appear to be less qualified than their subsequent performance in medical school proves them to be. (Robert H. Feitz, *The MCAT and Success in Medical School,* Sess. #9.03, Div. of Education Measurement and Research, Association of American Medical Schools (mimeo); Simon *et al., Performance of Medical Students Admitted Via Regular and Admission-Variance Routes,* 50 *J. Med. Ed.* 237 (Mar. 1975); Whittico, *The President's Column, The Medical School Dilemma,* 61 J. Nat'l Med. A. 174, 185 (March, 1969); Griswold, *Some Observations on the De Funis Case,* 75 Colum. L. Rev. 512, 514-515 (1975).

If it develops that this evidence was not presented or considered below, then the record is devoid of essential constitutional facts, and if this Court further discovers upon full argument that other essential elements of the record are totally absent, then *amici* urge that this case is not ripe for adjudication on the merits and that this Court should find that certiorari was improvidently granted.

As recently as June 1976 this Court has used its power acting per curiam to dismiss a writ of certiorari as improvidently granted. *Burrell v. McCray,* 426 U.S. 918, 48 L.Ed.2d 788, 96 S.Ct. 2640 (1976). As Mr. Justice Stevens stated, concurring:

> "[T]he Court's broad control of its discretionary docket includes the power to dismiss the writ because circumstances disclosed by a careful study of the record were not fully apprehended at the time the writ was granted, *The Monrosa v. Carbon Black Export, Inc.,* 359 U.S. 180, 183, 3 L.Ed. 2d 723, 79 S. Ct. 710, . . ."

Although writing in dissent, Mr. Justice Brennan, with whom Mr. Justice Marshall joined, stated:

> "We have held that such dismissals are proper only when the more intensive consideration of the issues and the record in the case that attends full briefing and oral argument reveals that conditions originally thought to justify granting the writ of certiorari are not in fact present. '[C]ircumstances . . . "not . . . fully apprehended at the time certiorari was granted." ' *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183 (1959), may reveal that an important issue is not in fact presented by the record, or not presented with sufficient clarity in the record, or compel the conclusion that 'the standards governing the exercise of our discretionary power to review on writ of certiorari (such as) . . . "special and important reasons" for granting the writ . . . as required by Supreme Court Rule 19,' are not met."

Amici urge that this Court should conclude that the absence of proof on the question of a past history of discrimination by the University of California Medical School at Davis, petitioner herein, makes it impossible for this Court to decide these "questions of public importance . . . in the context of meaningful litigation." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184, 3 L.Ed.2d 723, 727, 79 S.Ct. 710, 713 (1969).

The power to dismiss a writ as improvidently granted is illustrated by numerous prior decisions of this Court.

A comprehensive discussion of the doctrine is found in the opinion of Mr. Justice Frankfurter in *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). There the Court found that a new state statute had been passed which would afford a remedy in such a case, but it had not been suggested as a ground for opposing the grant of certiorari. "Its importance was not put in identifying perspective, and it did not emerge to significance in the shifting process through which the annual hundreds of petitions for certiorari pass." 349 U.S. 75, 99 L.Ed. 901, 75 S.Ct. 617. So, too, in the case at bar neither party brought to the attention of the Court as a reason for the denial of the writ of certiorari the fact that no evidence had been adduced into the record in support of the crucial question as to a past policy of discrimination by the University against applicants of minority races. It may be understandable that the University was loath to make such proof but this cannot affect the crucial hiatus in the record, namely the absence of proof on a question essential to a finding that the University's Affirmative Action Program was essential precisely to overcome the effects of discrimination in the past.

> "There is nothing unique about such dismissal even after full argument. There have been more than sixty such cases and on occasion full opinions have accompanied the dismissal. . . . [T]he Court has not hesitated to dismiss a writ even at this advanced stage where it appears on further deliberation, induced by new considerations, that the case is not appropriate for adjudication." 349 U.S. 78-79, 99 L.Ed. 903, 75 S.Ct. 618-619.

In a footnote Mr. Justice Frankfurter listed over sixty cases involving a dismissal on the ground that certiorari had been improvidently granted. (349 U.S. at 78, n. 2.) Mr. Justice Frankfurter makes clear that his list of authority was not to be deemed comprehensive.

> "[O]nly in the light of argument on the merits did it become clear in these numerous cases that the petitions for certiorari should not have been granted."

This Court has already been urged in a brief amicus filed by The National Urban League and sixteen other organizations in opposition to the petition for writ of certiorari to deny decision of this case on the merits because of the inadequacies of the record below. The Court has not been convinced, and instant *Amici* now urge the Court after argument and a fuller examination of the record, in view of the circumstances which must now have become apparent, to deny the writ as improvidently granted. See *Estelle v. Gamble,* 425 U.S. 932, 48 L.Ed.2d 173, 97 S.Ct. 285 (1976), Mr. Justice Stevens dissenting.

Conclusion.

It has been clear since *Swan v. Board of Education,* 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971) that the Constitution requires effective measures be taken to overcome the effects of racial discrimination in the schools and that race may be taken into consideration as a remedial measure. It has been inescapable since *Washington v. Davis,* 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976) that a proper proof be presented of the discrimination said to exist

in order to justify affirmative measures. *Amici* submit that the total absence of essential proof in this record, readily available, compels the dismissal of the writ as improvidently granted. It may be appropriate for the California Court to bind its citizens under such circumstances, but this high Court should abstain from imposing a rule on all fifty states within its jurisdiction until litigation arises upon a full record worthy of adjudication.

Respectfully submitted,

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APPENDIX "A".

Statement of John S. Wellington, M.D.

My name is John S. Wellington, M.D., currently Professor of Pathology at the School of Medicine, University of California, San Francisco, California. From the years 1965 to 1975 I served as Associate Dean of the Medical School with responsibility for admission. This statement is intended to provide a background on the development of the affirmative action program at the School of Medicine, University of California, San Francisco.

To the question, "Why haven't minority students been admitted to medical school in the past?", it is doubtful that many schools would answer, "Because they were systematically excluded." Most schools would profess no bias whatsoever, or even a positive bias toward admitting "qualified" minority applicants. The key word is *qualified*, which came to mean high grade point average, although sometimes an applicant was found acceptable if his grade point average was not very high but he had high MCAT (Medical College Admission Test) scores, especially in science, and came from a prestigious school. Not many minority students could fit into this category, and it became apparent to them that it was useless to apply.

The existing selection procedures did, in fact, systematically exclude minority students. Given the assumption that potential as a physician is distributed randomly with regard to race, it was certain that many individuals of high potential were being systematically excluded from medical school by our so-called unbiased selection system.

The records of the medical school revealed that between World War II and 1964, there had been

only 7 black graduates, and between 1964 and 1968, 4 more. Only one black graduate could be identified in the years between 1866, when the school was founded, and World War II. It was the view stated by 3 private black physicians in San Francisco, who were also volunteer members of the faculty, that black students had not sought admission to the school in any numbers because they felt that the University of California School of Medicine in San Francisco was a segregated institution. In an attempt to correct this reputation, specific recruiting in the Black and Mexican-American communities of Northern California had been undertaken by white students and faculty in 1965, with no results.

Finally, and as a result of continued recruiting efforts, in 1967 and 1968 a total of 12 black students was admitted by action of the Dean. Traditionally, in the past (but no longer), the Dean had been granted by the faculty the prerogative of filling a small number of places in each entering class with individuals who had not necessarily been selected by the faculty committee on admissions. This procedure supposedly served as a means of insulating the committee from outside pressure by alumni, legislators or others. It also allowed some flexibility in an admissions procedure that had in the past (again no longer) been tied exclusively and rigidly to the consideration of college grades. In 1967 and 1968, no sons of alumni received this special treatment, but minority students did.

The following figures summarize the changes in racial composition of professional schools on our campus from 1965 to 1970:

Blacks:	1965	California	6%	UCSF	1%
	1970		8%		4%
Spanish Surnames:	1965	California	10%	UCSF	1%
	1970		12%		2.5%
Chinese-Japanese	1965	California	1.5%	UCSF	5%
Ancestry:	1970		2%		5%

In 1969, an admissions subcommittee was constituted with the charge of selecting minority students. Minority was defined as that group "socio-economically different from the majority of persons, and who because of socio-economic differences would, without special assistance, be unable to pursue a course of higher education, or be able to do so only with disproportionately greater difficulty." Most of the students considered by this committee were from various ethnic minorities, and most of the committee members themselves were of minority origin. The entering classes since 1969 have all been made up of a quarter or more of minority students—30 or 40 in a class of 146—many of whom fit the definition above, as well as a smaller number of Caucasian students who fit the same definition.

We are making some progress at a painstakingly slow pace, and this because we have to make up now for the many years of restrictive selective procedures which resulted in barring the doors of the school to minority applicants.

/s/ John S. Wellington, M.D.
May 2, 1977